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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 11 CV 05201 (DLC)
FEDERAL HOUSING
4 FINANCING AGENCY 11 CV 06188 (DLC)
11 CV 06189 (DLC)
5 11 CV 06190 (DLC)
v. 11 CV 06192 (DLC)
6 11 CV 06193 (DLC)
UBS AMERICAS INC. 11 CV 06195 (DLC)
7 and others and its 11 CV 06196 (DLC)
related cases 11 CV 06198 (DLC)
8 11 CV 06200 (DLC)
11 CV 06201 (DLC)
9 11 CV 06202 (DLC)
11 CV 06203 (DLC)
10 11 CV 06739 (DLC)
11 CV 06805 (DLC)
11 11 CV 07010 (DLC)
11 CV 07048 (DLC)

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July 19, 2012
4:12 p.m.

13 Before:

14 HON. DENISE COTE,

15 District Judge

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1 THE COURT: Good afternoon, counsel. I have you on
2 the speaker phone because my law clerk and a court reporter are
3 with me. I'll briefly take appearances. For the FHFA?

4 MS. CHUNG: Christine Chung, and I have with me today
5 Richard Schirtzer. My partner is in Los Angeles, his name is
6 David Schwartz.

7 MS. LEUNG: Kanchana Leung from Kasowitz, Benson,
8 Torres and Friedman.

9 THE COURT: For UBS?

10 MR. FUMERTON: Good afternoon, your Honor. Rob
11 Fumerton from Skadden, Arps. I'm joined by my colleagues Joe
12 Sacca and Scott Musoff. Your Honor, Jay Kasner is unavailable
13 to participate today.

14 THE COURT: For JP Morgan?

15 MS. SHANE: Your Honor, Penny Shane, Sharon Nelles and
16 Jonathan Sedlak from Sullivan and Cromwell.

17 THE COURT: From Goldman Sachs?

18 MR. KLAPPER: Richard Klapper and Theodore Edelman
19 from Sullivan and Cromwell.

20 THE COURT: For Barclays?

21 MR. SCOTT: Jeff Scott with Sullivan and Cromwell.

22 THE COURT: For First Horizon and Nomura.

23 MR. CLARK: Bruce Clark and Amanda Davidoff, Sullivan
24 and Cromwell.

25 THE COURT: For Citigroup?

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1 MR. BIRENBOIM: Bruce Birenboim and Caitlin Grusauskas
2 for Citigroup.

3 THE COURT: For Credit Suisse?

4 MR. CLARY: Richard Clary from Cravath, Swaine and
5 Moore.

6 THE COURT: For RBS?

7 MR. RICE: Afternoon, your Honor. Tom Rice and David
8 Woll from Simpson, Thacher and Bartlett.

9 THE COURT: For HSBC?

10 MR. CONLON: John Conlon from Mayer Brown.

11 MR. NORMAND: Ted Normand from Boies, Schiller and
12 Flexner.

13 THE COURT: For Ally?

14 MR. GOEKE: Reginald Goeke and Catherine Bernard from
15 Mayer Brown for Ally.

16 THE COURT: For Ally Securities?

17 MR. BRYAN: Patrick Bryan, Kirkland and Ellis for Ally
18 Securities.

19 THE COURT: Bank of America and Merrill Lynch?

20 MR. BENNETT: Good afternoon, your Honor. Ted Bennett
21 and Beth Stewart from Williams and Connolly.

22 THE COURT: For Morgan Stanley?

23 MR. ROUHANDEH: Jim Rouhandeh, Brian Weinstein and
24 Daniel Schwartz from Davis, Polk.

25 THE COURT: For GE?

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1 MR. DANILOW: Greg Danilow and Seth Goodchild from
2 Weil, Gotshal.

3 THE COURT: For the various individual defendants,
4 including George Carp?

5 MR. BINDER: Neil Binder, Richards, Kibbe and Orbe.

6 THE COURT: For Mr. Molinaro?

7 MS. CHEPIGA: Pamela Chepiga and Josephine Cheatham,
8 Allen and Overy.

9 THE COURT: For Mr. Verschleiser?

10 MS. JAMES: Dani James from Kramer, Levin.

11 THE COURT: Thank you, counsel, for making yourselves
12 available on such short notice to address two brief issues.
13 I'm going to ask counsel please to identify themselves by name
14 before they speak so that the record is clear. I'm also going
15 to ask counsel to be careful not to interrupt each other. It's
16 very difficult to conduct a telephone conference if two people
17 are speaking.

18 I'll make sure to ask everyone at the end whether they
19 have anything that they need to add; so everyone will be given
20 an opportunity to be heard.

21 We're having this conference call because I've
22 received three letters. Let me identify those for the record.
23 I have a letter of July 17th from Skadden, Arps and a
24 responsive letter of July 18th from Quinn Emanuel, and then I
25 have a letter of July 18th, and I -- written on behalf of all

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1 parties. So let's address these two issues separately.

2 The first issue is the request of all defendants,
3 presented through Skadden, Arps' letter, for access to FHFA's
4 forensic review of individual loan files, which was referenced
5 in the complaints that the FHFA filed in this series of
6 litigations. If I read Mr. Selendy's letter of July 18th
7 correctly, and this is why I needed to speak to counsel, I
8 understand -- and I'm referring here to the second full
9 paragraph on Page 2 -- that the FHFA intends to produce its
10 forensic review of individual loan files, that is, the specific
11 report or reports that were referenced in the complaints as
12 part of expert discovery. Is that correct, Miss Chung? Is
13 that correct, Miss Chung?

14 MS. CHUNG: Yes, your Honor. Christine Chung of
15 Quinn, Emanuel.

16 It's not quite correct. We're offering to produce and
17 have told the defendants that we are willing to produce the
18 loan files themselves, and I think the area of dispute is to
19 the extent they're asking for reports or results that were
20 generated, that's what we consider the work product that they
21 should not be able to get because we're giving them the
22 underlying factual information that will enable them to perform
23 their own analysis and effect their own homework on the loan
24 files.

25 THE COURT: No, I understood that argument, but

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1 there's a sentence here in the paragraph that begins "Finally,
2 has never been FHFA's claim," that paragraph.

3 MS. CHUNG: Yes, your Honor.

4 THE COURT: "Indeed, FHFA intends to produce the
5 former as part of expert discovery and the latter in document
6 discovery." I understood --

7 MS. CHUNG: Yes.

8 THE COURT: -- the former to be the results of the
9 reviews referenced in the complaints. Am I reading that wrong?

10 MS. CHUNG: That's correct, your Honor. If, as the
11 sentence continues, if we determine that we're going to rely on
12 those reviews at trial. So as your Honor's aware, our proof on
13 the loan files at trial is really going to be the
14 re-underwriting of the samples that we're going to draw at each
15 of the cases.

16 It's not our current intention even to rely on the
17 reviews that were done pre-complaint as part of our trial
18 proof. However, obviously, to the extent that we decide that
19 we're going to rely on these reviews at trial, we will produce
20 them and we've never said differently.

21 From our very first responses to the requests that
22 were made by the defendants, which said that they were making
23 privileged claims, but subject to those privileged claims, we
24 will produce responsive information. But we will produce the
25 reports and the reviews.

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1 To answer your Honor's question directly, to the
2 extent that we're going to rely on them at trial or as the rest
3 of the sentence continues, there is some cases in which the
4 reports that were generated that we think are otherwise are our
5 mental impressions and work product, were produced to third
6 parties. The same reviews were used as a basis for seeking
7 remedies from certain parties. Obviously, as to those, we
8 don't have the claim that we can make, and we agree to produce
9 those.

10 THE COURT: Well, I think the natural reading of the
11 paragraph and, of course, that really is beside the point, if I
12 misread the sentence. The natural reading of that last
13 sentence in the paragraph we're looking at suggested to me the
14 dispute was really one about timing and not whether or not the
15 defendants would ever get to see the reviews that were
16 referenced in the complaints.

17 But I now understand you to be saying, Miss Chung,
18 that you are -- it is your current intention to never produce
19 to the defendants the reviews that are referenced in the
20 complaints unless you're going to rely on those reviews in
21 connection with expert testimony at trial or you shared them
22 with third parties; do I understand that correctly?

23 MS. CHUNG: Yes, your Honor.

24 THE COURT: Okay. So I'll reflect on this further,
25 now that I understand there really is a dispute of substance.

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1 MR. FUMERTON: Your Honor, may I be heard on this
2 issue? This is Robert Fumerton from Skadden, Arps on behalf of
3 UBS.

4 THE COURT: Yes. After I finish speaking,
5 Mr. Fumerton, I'll let you be heard.

6 MR. FUMERTON: Sure. Thank you, your Honor.

7 THE COURT: So the issue for me in the first instance
8 and how I think I'm going to approach this is really a
9 double-barreled one. The issue is whether or not the work
10 product privilege has been waived by the use of those reviews
11 in the complaints, but, secondly, even if I find that it has,
12 it seems to me an additional issue could be when those reviews
13 need to be produced, and it seems to me they are in the nature
14 of the kind of document that one would expect to be produced as
15 part of expert discovery.

16 Now, I'll look at the law with respect to the waiver
17 issue and reflect on this, but I would like counsel to talk
18 about, even if I decide they are discoverable, why they
19 shouldn't be produced with respect to the first wave of expert
20 disclosures.

21 Now, I don't think I know what the parties have agreed
22 to informally with respect to the production of waves of expert
23 disclosures. I know that in our last conference together, I
24 think it was the last one, we talked about how important it
25 would be to begin those disclosures sooner rather than later

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1 and not wait, for instance, until a lot of fact depositions had
2 been taken. And I was hopeful that you'd begin to start making
3 certain expert disclosures late fall, early winter.

4 Mr. Fumerton, you wanted to be heard?

5 MR. FUMERTON: Yes, your Honor. You know, it's,
6 obviously, our position from our letter that we think it's
7 fundamentally unfair for plaintiff to expressly rely on the
8 results of these purported forensic reviews to survive motion
9 practice and then not even disclose those results for the
10 defendants to challenge.

11 But to address your issue on timing, this is work that
12 plaintiff has already done. They've alleged in the complaint,
13 and while they claim they're going to give us the loan files
14 that comprise that review, which we haven't received yet, the
15 loan files themselves do not inform us at all of the basis for
16 plaintiff's allegations that the loans are defective, and
17 that's precisely what we need to defend against these claims
18 and to develop our defenses through discovery.

19 If you take the UBS action, as an example, plaintiff
20 claims to have conducted a review of 996 loans and claims that
21 78 percent did not comply with applicable underwriting
22 standards. This is information that they've already -- they
23 can't allege that if they don't have that information in their
24 possession now, if they haven't already done that review. But
25 from defendants' perspective, we do not know which of the 996

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1 loans plaintiff claims were defective, and just as importantly,
2 we do not know the manner in which plaintiff claims they're
3 defective.

4 There are a myriad ways in which plaintiff could
5 allege the loan was not underwritten in accordance with
6 underwriting guidelines. It could be missing documentation or
7 a FICO score that's too low, but we can't prepare our defenses
8 without knowing the basis for plaintiff's claims, and this is a
9 review that plaintiff predicated its action on.

10 To the extent in its letter from yesterday, plaintiff
11 indicated, well, we may not rely on that same review to
12 prosecute its claims. If that's the case, you know, we need
13 the sample and the results of whatever review they're
14 purporting to rely on as soon as possible, as well.

15 As your Honor just indicated, and as your Honor
16 indicated during the June 13th conference, we should have
17 rolling expert disclosures. We have repeatedly asked plaintiff
18 at meet and confers over the last several weeks, for a date
19 certain by which plaintiff will identify the specific loans by
20 loan ID, and any sample it intends to use, the loans within
21 that sample that it claims are defective and the manner in
22 which each such loan is purportedly defective.

23 If we have that information, if plaintiff agrees to
24 provide that information, defendants will respond on a
25 loan-by-loan basis, and then the parties can narrow the

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1 disputed loans at issue for the rest of discovery and for
2 expert discovery. The loans at issue, meaning the loans that
3 plaintiff intends to rely on to prosecute its claims.

4 So in terms of timing with respect to the forensic
5 review that they've alleged, that's all been done, and we think
6 we're entitled to at least the results of those reviews or any
7 report. And after we've received that, we can think about how
8 to potentially narrow the request.

9 I would point out for your Honor that the only cases
10 that plaintiff cites that address these issues in footnote one
11 of their submission, in both of those cases plaintiff had
12 already produced to defendants either the final report or the
13 results of the forensic review, i.e. the specific loans it was
14 claiming were in breach and the specific manners in which they
15 were breached. That's the information we're asking for here in
16 the first instance, and we don't see any reason why it
17 shouldn't be produced right away.

18 THE COURT: Well, Mr. Fumerton, I have a couple of
19 reactions to that. Whatever review the plaintiffs did at the
20 time they were preparing their complaint would not limit their
21 ability to present an argument at trial. So in a way, it's
22 sort of a wasted effort for you, even if you had access to this
23 review, to spend much time on it because the plaintiffs would
24 be entirely within their rights to do a completely new review
25 of different loan files with completely different numbers and

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1 present that evidence at trial.

2 Let me ask you this question, Mr. Fumerton. How long
3 have the plaintiffs had the loan files for the supporting loan
4 groups that are at issue in the UBS case?

5 MR. FUMERTON: Your Honor, to address that question,
6 we don't know what loan files plaintiff has. We've repeatedly
7 asked plaintiff for the loan files in the supporting loan
8 groups in the UBS action and they have not produced them to us
9 yet. UBS does not maintain these loan files as a matter of
10 course; so we don't have them. We've sought from third parties
11 the loan files, the -- sorry. We sought from plaintiff on
12 May 22nd all of the loan files they have, and we served
13 third-party discovery requests for all the loan files from
14 third parties.

15 So if those plaintiffs and UBS are trying to get all
16 of the loan files from the supporting loan groups, we don't
17 have them in our possession. We know that plaintiff does have
18 some because they've conducted this review, and we've asked
19 them for it, but we haven't received them to date.

20 If I could just, your Honor, address the point you
21 just made, which is, you know, if plaintiff is going to change
22 its methodology, you know, we don't need to see the results of
23 the review they allege in their complaint. We actually think,
24 you know, we are entitled to see the result of that review
25 because to the extent the review they conducted or the results

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1 of that review, which they've predicated their entire claims
2 on, as your Honor recognized in the motion to dismiss decision,
3 we think we're entitled to see what that methodology was, to
4 the extent it contradicts the methodologies plaintiff intends
5 to use down the line.

6 We think that's very fertile ground for
7 cross-examination and, again, we think we're entitled to that
8 information because plaintiff expressly relied on those very
9 reviews and the results of those very reviews to survive
10 motions to dismiss.

11 THE COURT: Well, Mr. Fumerton, thank you for those
12 comments, but I think -- and, of course, Ms. Chung can give me
13 the perspective of the FHFA, but it seems to me in knowledge in
14 supervising civil litigation, that the defendants are entitled
15 to develop an evidentiary basis through discovery beyond that
16 on which they premise their pleadings.

17 And I'm happy to meet with counsel, if you're at
18 loggerheads, in working out a more detailed schedule for the
19 conduct of expert discovery. But as we discussed at the last
20 conference, the position of the plaintiff, in response to the
21 defendants' position, was such that there was no agreement that
22 any subset of loan files from the supporting loan groups would
23 be the basis of the trial of the claims in this case.

24 As a result, despite the burden and expense it will
25 place on all parties, my conclusion from that conference is

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1 that you were all in agreement, you had to have access to a
2 hundred percent of the loan files from the supporting loan
3 groups and so unless and until the plaintiffs and defendants
4 have access to that complete universe, based on your current
5 positions with each other, that it is impossible to do any
6 sampling, at least from the defendants' position, meaningful
7 sampling to which you're willing to restrict yourself without
8 access to all of the loan files for the supporting loan groups.

9 It would be impossible to expect either defense
10 counsel's expert or plaintiff counsel's expert to come up with
11 the analysis on which they're going to rely at trial. Now, if
12 your position is chain ming and you're happy to restrict the
13 trial in the UBS case to the loan files that the FHFA currently
14 has in its possession and require it then to produce an expert
15 report on, you know, a prompt basis, I think we're talking
16 about a different kind of schedule.

17 So let me say I'll think about these issues, but
18 preliminarily, I'm not going to require the FHFA to produce its
19 review that it used of loan files for draft complaints in this
20 litigation before it would produce the expert report on which
21 it's going to rely at trial for its analysis of, among other
22 things, a failure to comply with underwriting guidelines. I'll
23 look carefully at my own research and, of course, anything the
24 parties have cited in their letters with respect to whether it
25 even needs to produce its review that it used for the

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1 complaints at that time.

2 Let's turn to the second issue -- Well, before we do
3 that --

4 MR. FUMERTON: Your Honor, I can address two points
5 quickly, please?

6 THE COURT: Is this Mr. Fumerton?

7 MR. FUMERTON: It is. I'm sorry. Rob Fumerton from
8 Skadden, Arps.

9 With respect to the results of the forensic review
10 alleged in the complaint, we're aware of no authority that
11 would allow them, to the extent that they've waived that work
12 product privilege, and we think that it's clear that they have
13 by placing at issue in the complaint, we're of aware of no
14 authority to delay production of materials that they already
15 have.

16 We're not saying that the plaintiff isn't entitled to
17 develop its claims or to develop further methodologies
18 throughout discovery. We're not taking that position at all.
19 We're saying to the extent that they already performed this
20 work and put it at issue in the complaint, we're entitled to it
21 now.

22 Second, with respect to sampling, the defendants'
23 position hasn't changed. We do think it's inappropriate for
24 all the reasons we talked about at the last conference, in our
25 submission, to restrict the universe of loan files at this

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1 stage. Plaintiff, however, has indicated to us that it intends
2 to prosecute its claims through the use of the sample.
3 Plaintiff's counsel even informed us, informed defendants, that
4 it would, quote, roll out these samples so the prioritization
5 of loan file production could include the loans in their
6 sample.

7 What we're saying here is, look, we, obviously, need
8 access or potentially need access to loan files outside of
9 plaintiff's sample to develop various defenses, including
10 causation and everything we've submitted last month. But what
11 we are in favor of, which your Honor has expressed, you know, a
12 view of at the last conference is to set a schedule early for
13 plaintiff to identify the sample that it has already informed
14 us it is using, identify the loans in that sample that claims
15 are defective and the manner in which they're defective.

16 And then we can respond, but we can't respond until we
17 have that additional information because we don't know how
18 plaintiff attempts to prosecute these claims. We don't know
19 what loans plaintiff intends to rely on, and we don't know the
20 breaches that plaintiff is going to affirm to prove. Once we
21 have that information, we can respond.

22 THE COURT: Okay. And have you made a proposal,
23 Mr. Fumerton, with what you think is an appropriate schedule
24 here?

25 MR. FUMERTON: We are -- We've asked plaintiff

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1 repeatedly at meet and confer if they would agree to a date
2 certain. They said they would not, but we are absolutely
3 prepared to propose a specific date, specific deadlines for the
4 plaintiff to provide the samples and the manner in which such
5 loans are defective, and then respondents will respond at least
6 on behalf of UBS on a loan-by-loan basis. So we're absolutely
7 prepared to present a schedule to the Court.

8 THE COURT: So, Miss Chung, is there any reason why
9 these meet and confers can't meet and the parties agree on a
10 schedule and, if necessary, then meet with me the following
11 week?

12 MS. CHUNG: Your Honor, no, but I think I would like a
13 chance to respond. Your Honor rightly pointed out that there
14 are sort of two groups of loans at issue. There's a group of
15 loans that were reviewed for the complaint. There is a group
16 of loans that are going to be samples, at least, you know, we
17 do plan to propose a sample.

18 I can tell the Court in terms of what Mr. Fumerton is
19 proposing, we're going to identify next week to him the loans
20 that we are going to be looking at in both of those groups. We
21 said in our letter to the Court that we're going to be sending
22 to all defendants a list of the loans, by loan number, that we
23 reviewed in getting the complaint.

24 To the extent that their concern is we don't have
25 notice right now of which loans you were looking at in that

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1 group, they're going to have that. They're going to have most
2 of that next week. It might carry over until the week after
3 that, but we're going to be able to identify all those loans to
4 them in very short order.

5 In the second group of loans that Mr. Fumerton is
6 talking about, I want to be clear because your Honor is making
7 a proposal. This has been the topic of many, many meet and
8 confers between the plaintiff and defendants. In our view, it
9 has two separate sets. We are willing to identify, and I said
10 this at the outset, the loans that we're going to be looking at
11 as samples and we're generating the sampling protocols, but
12 that has been limited by, among other things, our inability or
13 suffice -- let me put it in a positive way.

14 The parties have been working together to get us all
15 the information that we need to generate our sampling protocol.
16 I don't know what the defense is doing in terms of their
17 protocol, but we will generate ours now. The UBS protocol, we
18 will identify standalones that we intend to rely on next week.

19 So we know that your Honor's aware that we proposed a
20 UBS protocol in our mission support for the last conference.
21 We did reserve the right to refine that based on other
22 information that came in from the loan case. So we're revising
23 that analysis now, but sometime next week we'll be able to
24 identify, next week, in the UBS case, which loans will be --
25 let's put it this way, will be in our sample, and they will

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1 challenge that whatever way they want, but they will have
2 notice of which loans we intend to sample.

3 But the second stage of that analysis, and I think we
4 discussed this before your Honor at the last conference. It's
5 a separate thing to say, well, we also want to know what you
6 think is wrong with the loans. Our view is we should identify
7 the loans to them, and then both sides should go to work and
8 figure out what they think is right and wrong about the loans,
9 and then have expert discovery because that will take some time
10 and the experts have to go to work on that.

11 And in expert discovery, the parties will then
12 exchange expert reports about what they found as a result of
13 having re-underwritten the loan files to see if they were
14 indeed originated, the loans were originated in compliance with
15 the guidelines when they were originally originated.

16 What the defendants want, in our view, is sort of
17 preliminary discovery, expert discovery from the plaintiff, and
18 what we propose is, no. We're totally going to identify the
19 loans to you, but then each side should go to work, sort of
20 contemporaneously, and then be ready to exchange expert reports
21 in short order. Of course, we'll go first. We will exchange
22 expert reports with them first.

23 What we oppose is the idea of moving that aspect of
24 expert discovery into basically document discovery. That's the
25 proposal that has been discussed before, and we're willing to

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1 meet and confer about it again. But to the extent that
2 there's -- and I still hear it in Mr. Fumerton's proposal, they
3 want the analysis at the same time that they're asking for the
4 loan identifications, that's where we have had a disagreement
5 in the past, and I would guess that we're not going to agree on
6 that going forward.

7 THE COURT: Well, Miss Chung, you will not receive an
8 agreement from defense counsel as to any sampling technique you
9 propose, based on what I heard at the last conference.

10 MS. CHUNG: We understand that, your Honor. And what
11 we're offering to do is tell them what our sample is. We
12 absolutely understand that they have reserved their right to
13 challenge in any way but, you know, we also feel that -- we're
14 trying to offer what we think is more than fair, which is we'll
15 identify our samples to you.

16 The part that we don't feel that they're entitled to
17 is they request and demand our analysis of those loans in the
18 document discovery.

19 THE COURT: Well, Miss Chung, I would like you to meet
20 and confer with Mr. Fumerton or defense counsel, more
21 generally, whoever is appropriate on these issues next week
22 with a proposal, a proposed schedule for how you would like
23 this information and these reports to be rolled out. Your
24 proposal, with dates or with as much specificity as you can.

25 Mr. Fumerton, or other defense counsel, will meet and

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1 confer with you, or whoever on your team they should be talking
2 to, with counter proposals if they're unhappy, but I'd like the
3 meet and confer process to occur next week so we can have
4 something concrete to address. And I'll be happy to see you
5 the following week, if that is necessary. Mr. Fumerton?

6 MR. FUMERTON: Yes, thank you, your Honor. That
7 sounds great to us, and we look forward to continuing to meet
8 and confer to try to get an agreed-upon schedule.

9 THE COURT: Okay.

10 MS. CHUNG: That's fine, your Honor.

11 THE COURT: Before we move to the second issue,
12 Miss Chung, is there anything further you wish to say?

13 MS. CHUNG: I just wanted to say, your Honor, we're
14 happy to meet and confer. You actually said something that, in
15 my mind, is worth including in this meet and confer process.
16 We've also raised this with the defendants before, which is, if
17 there is going to be disagreement about the sampling procedure,
18 and we all anticipate there will be, certainly in our view the
19 orderly way to approach this would be people would -- we're
20 going to go first. We're willing to do it. We're going to
21 make our sample known.

22 If there's going to be a challenge to that, or there's
23 going to be competing samples or the defendants are still
24 saying we may just object to sampling altogether, we think that
25 should be part of what gets aired because our view would be if

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1 that's going to be one disagreements we're going to have, we
2 should air that to the Court sooner rather than later.

3 Otherwise --

4 THE COURT: Great. Put that in your proposal.

5 MS. CHUNG: Thank you, your Honor.

6 THE COURT: Good. Now, before we move on to the
7 second issue, Mr. Fumerton, is there anything else you wanted
8 to add?

9 MR. FUMERTON: No. Thank you, your Honor.

10 THE COURT: Is there any other counsel on this
11 telephone call, before we move on to the second issue, who
12 wishes to be heard on this issue? Not hearing anyone, and
13 thank you for your restraint, much appreciated, let's move to
14 the second issue.

15 And that is a request, a joint request by the FHFA and
16 defense counsel for the briefing of a protective order motion.
17 The motion would be made by the FHFA on July 25th and would
18 become fully submitted on August 3rd, and I would just -- I'm
19 happy to have a motion, if that's the most efficient way to
20 resolve an issue. But it was unclear to me from the letter
21 what the issue is that would be the subject of the motion and,
22 therefore, whether a motion is the most efficient way to
23 address it and preserve the defendants' or protect all parties'
24 rights. So, Ms. Chung, what's this --

25 MR. SCHIRTZER: Actually, this is Richard Schirtzer,

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1 and I'm going to be addressing this issue.

2 THE COURT: So, Mr. Schirtzer, what motion do you want
3 to bring?

4 MR. SCHIRTZER: Well, candidly, I agree with your
5 Honor that it is probably premature to describe what motion
6 we're going to bring, and it's not clear to FHFA that
7 submitting a brief on Tuesday under a briefing schedule is the
8 most efficient way of doing this.

9 I essentially ceded to a request for a joint briefing
10 schedule based on a series of meet and confers with defense
11 counsel, where they indicated pretty clearly that despite the
12 meet and confers and despite considerable additional
13 information that we had promised to provide them on Monday,
14 that they were fairly confident that there was still going to
15 be unresolved issues, and they were very concerned about time
16 frame. And so on that basis, without crystallization of the
17 exact issues in dispute, we submitted the proposal for a joint
18 briefing schedule.

19 I, however, remain sanguine, as I told the defendants
20 before, that when they see the additional information that we
21 have promised to provide and plan to provide on Monday, that
22 much of this dispute will be obviated and perhaps the motion
23 will be unnecessary.

24 THE COURT: Okay. Mr. Fumerton, I don't know if this
25 is your issue?

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1 MR. FUMERTON: It is, your Honor, and we're very
2 frustrated with the pace of discovery here. Just to give your
3 Honor some context, in the June 7th Rule 26F report, both
4 parties agreed to early 30(b)(6) depositions aimed specifically
5 at the identity of custodians with relevant knowledge and
6 discoverable information.

7 As we indicated in our July 2nd letter to the Court,
8 the parties have exchanged additional lists of custodians and
9 search terms, and defendants believe the list of custodians the
10 plaintiff proposes search for ESI responsive to our document
11 request is plainly insufficient. And based on the limited
12 information the defendants have in their possession, and this
13 is just information -- essentially it's communications between
14 defendants and the GSEs, we've identified a tremendous number
15 of GSE employees that had substantive communications concerning
16 issues that are directly relevant to the claims and defenses at
17 issue here that the plaintiff has omitted from its custodian
18 list.

19 So as we indicated in that letter, rather than having
20 to move to compel on the custodian list, based on just the
21 limited information in our possession and then potentially have
22 to move again after we receive more information, we noticed a
23 rule 30(b)(6) deposition. We noticed it on June 28th pursuant
24 to the parties' agreement.

25 We noticed the deposition to seek information

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1 concerning the organizational structure of the GSEs, the
2 identities of groups and individuals that conducted things like
3 operational reviews, the mortgage originators, maintained
4 originator score cards, to see the lines of communications
5 between various divisions of these organizations; whether the
6 groups had access to shared libraries containing information
7 relevant to the securitization and the issues in this case; the
8 admitted document destruction of Freddie Mac, which just came
9 to light in the last couple of weeks.

10 All of these issues are all relevant to identifying
11 all appropriate custodians. So we noticed that deposition on
12 June 28th and we noticed it for July 12th, and in the last
13 couple of weeks, you know, we've had some meet and confers on
14 those topics, but the plaintiff indicates that it objects to
15 producing a 30(b)(6) witness, which has little or no burden on
16 the vast majority of topics in our notice. That's why we have
17 been pressing for a briefing schedule on the protective order.

18 It's, obviously, therefore for them to seek the
19 protective order, but we sought a briefing schedule as quickly
20 as possible so we can resolve this issue, take the 30(b)(6)
21 deposition and identify all of the relevant custodians. We're
22 concerned that time is running out here. It's, obviously, a
23 very compressed schedule, and we're moving as quickly as
24 possible. And we don't think there's any better vehicle than a
25 30(b)(6) deposition, which is why we've noticed it.

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1 Plaintiff, on the other hand, has refused to produce
2 any witness other than essentially a couple of IT people from
3 Freddie and Fannie to address basic document retention issues
4 or electronic systems. so that's why we did press plaintiff for
5 a briefing schedule, to get that locked in so we could move
6 forward here as expeditiously as possible.

7 MR. SCHIRTZER: Your Honor, this is Mr. Schirtzer
8 again. I have, not surprisingly, a very different perspective
9 on the process. As Mr. Fumerton said, we have agreed to
10 produce designee on document preservation issues, which I
11 believe covers three or four of the 12 topics in the 30(b)(6)
12 notice.

13 With respect to custodial issues, what I've said to
14 defense is that rather than trying to find a designee to
15 essentially parrot information that we're going to be
16 gathering, let us provide you with written responses on many of
17 the custodial topics that you claim you need more information
18 on.

19 The real dispute, however, your Honor, it stems from
20 not this 30(b)(6) notice, frankly, but from the scope of
21 discovery the defendants seek of Freddie Mac and Fannie Mae,
22 which is probably best exemplified in their interrogatory No.
23 3. With your indulgence, it asks that we identify all persons
24 employed by you or acting on your behalf who participated in,
25 were involved in, approved or were responsible in any way for

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1 the GSE's relationships, including as purchasers of loans with
2 any mortgage originator disclosed in the prospectus supplements
3 for the securitizations.

4 Your Honor, that is essentially half of the employees
5 at Freddie Mac and Fannie Mae, and these list of custodians who
6 they claim are absolutely relevant are, by and large, people
7 who work on what are called single side of Freddie Mac and
8 Fannie Mae, involved in purchasing conforming loans and putting
9 them into Freddie Mac or Fannie Mae securitizations, none of
10 which are at issue in this case.

11 We have consistently said to defendants that we would
12 identify custodians who were involved in the securitizations
13 that are involved in this case, which are all under what we
14 call the private label security side. We have a list of 64
15 agreed custodians who fall into that category, and we are
16 continuing to consider and add others.

17 Just so your Honor knows, based on that list and
18 agreed-upon search terms, we've already identified over 700,000
19 responsive documents. And based on search terms that we've
20 negotiated and agreed to with defendants, the universe of
21 responsive documents is going to go up to a million and a half
22 documents. So the question, really, that they seek to get at
23 with respect to these 30(b)(6) depositions is have we
24 appropriately identified relevant custodians, and we believe
25 that the written materials that we are to give them on Monday

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1 will show that, in fact, we have.

2 THE COURT: Well, I --

3 MR. SCHIRTZER: There will always be, quite
4 apparently, a dispute between the plaintiff and the defendant
5 as to whether information that was used or possessed on the
6 single-family side of Freddie Mac or Fannie Mae that was not
7 provided or considered by the people purchasing these
8 securitizations is, nevertheless, relevant, and that will be a
9 dispute.

10 But I don't know that that dispute is best tee'd up in
11 the context of a 30(b)(6) notice, and so for that reason, I do
12 think it would behoove all the parties to wait and see what we
13 are providing in the way of substantive information about
14 custodians, about what those custodians roles were, and how
15 they fit into the organizational structure so that they can
16 understand that we have, in fact, identified everyone who is
17 germane to these securitizations.

18 THE COURT: Thank you, counsel. I expect that
19 everyone would have a lot to say about this issue, and I don't
20 want to deprive anyone of an opportunity to be heard, and I
21 expect, Mr. Fumerton, you, in particular, have things you'd
22 like to advise me about; so this is my proposal.

23 I'd like you to meet and confer and get back to my
24 chambers with a time that's convenient for an in-court
25 conference Monday through Wednesday, July 30th to August 1st.

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1 Hopefully, sometime that would be convenient to most of you one
2 of those three days. That will give you next week to meet and
3 confer about any number of issues, scheduling of expert
4 discovery, access to additional custodians, anything else,
5 timing of 30(b)(6) witnesses, and we won't have briefing of a
6 protective order motion.

7 I'm happy to spend half a day looking at documents,
8 understanding the factual context for arguments you're making,
9 whatever would be helpful, and give you some rulings at that
10 conference for organizing this stage of the case. Is that
11 agreeable, Mr. Fumerton?

12 MR. FUMERTON: Yes, your Honor.

13 THE COURT: Thank you. Is that agreeable,
14 Mr. Schirtzer?

15 MR. SCHIRTZER: Yes. It is, your Honor. And as it
16 turns out, I'm going to be in New York that week anyway; so I
17 appreciate that offer.

18 THE COURT: Okay. And is there any other attorney on
19 this phone call who wishes to be heard with respect to this
20 second issue?

21 MS. SHANE: Yes, briefly. This is Penny Shane from
22 Sullivan, Cromwell.

23 We agree that that proposed approach is a good one,
24 but would ask that we have, as well, a date by which the
25 parties may provide your Honor with written material of

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1 whatever sort your Honor may feel is likely to be helpful so
2 the parties can make a judgment about what might be helpful.

3 It is an important factual context between the
4 parties. Mr. Schirtzer and the rest of us will be exploring
5 those facts with great interest and hope to be as comfortable
6 as Mr. Schirtzer is at some point with the facts and the
7 completeness of the facts as what he thinks we will be when we
8 see it.

9 Just in case, we would hope to have the opportunity to
10 provide your Honor with what seem to be the important factual
11 materials. Just by way of example, some of the structural or
12 organizational provisions that Mr. Schirtzer says we will have
13 demonstrated to us this coming week are directly contradicted
14 by both Freddie and Fannie's public files. That's the way I
15 survey it, period. So we would hope to have the opportunity
16 and have your Honor have the benefit of that, as well as
17 counsels' thoughts at that time.

18 THE COURT: Well, I'm happy to take written
19 submissions, and certainly anything that the parties plan to
20 show me at the conference, they should share with each other in
21 advance of the conference. I would like any written
22 submissions at least one full business day before the
23 conference.

24 You can decide on what schedule that suggests to you.
25 I'm happy to have them earlier if you have agreement, but

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1 again, any letter is no longer than two pages. You can have
2 attachments you want me to look at, but I'm primarily going to
3 concentrate on giving you an opportunity to be heard at the
4 conference. And, again, if you're planning to hand out
5 anything at the conference, share it with your adversary well
6 in advance of the conference so they have a chance to look at
7 it and talk about it with you.

8 Anyone else who wishes to be heard? Thank you so
9 much.

10 MR. BENNETT: Your Honor, Ted Bennett from Williams
11 and Connolly for Merrill Lynch 5202.

12 I guess I go a step farther. I think, given the
13 gravity of these issues to the entire case and the defendants'
14 ability to put on their defense and, for that matter, for FHFA
15 to prove the elements in it claims which are its burden, we'd
16 suggest that the Court entertain full briefing on these issues.

17 We'd be happy to do it on as abbreviated a schedule as
18 is reasonable, but we think this would be better served by full
19 briefing than by a hearing, at which surprise might be more
20 norm than well-written arguments by counsel.

21 THE COURT: Thank you. Your application is denied.

22 Anyone else need to be heard? Thank you so much
23 counsel for participating in today's conference.

24 (Adjourned)
25